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IN THE

Supreme Court of the United States

October Term, 1950
No. 279

PEOPLE *ex rel.* JOHN K. MOFFETT,

Petitioner,

v.

SPENCER E. BATES, HARRY E. CLINTON and ALLEN J. GOODRICH, constituting the State Tax Commission of the State of New York,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI

To the Honorables The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully prays for a writ of certiorari to review an order and judgment of the Court of Appeals of the State of New York, entered on June 2, 1950, affirming an order of the Appellate Division of the Supreme Court of the State of New York for the Third Judicial Department, which confirmed a final determination of the New York State Tax Commission assessing petitioner for Unincorporated Business Tax under New York Tax Law, Article 16-A for the years 1941, 1942 and 1943.

Opinions Below

The opinion of the New York State Tax Commission is not reported but is contained in the record (pp. 46-49). The opinion of the Appellate Division of the Supreme Court of the State of New York, Third Department is reported in 276 App. Div. 38 and is printed in the record (pp. 52-55). The order of the New York Court of Appeals is reported in 301 N. Y. 597 and is printed in the record (pp. 56-57). The order of the New York Supreme Court for Albany County entered upon the remittitur from the New York Court of Appeals is not reported but is contained in the record (pp. 57-58).

Basis of Jurisdiction

The order of the New York Court of Appeals was entered on June 2, 1950, and the basis of the jurisdiction of this Court is Sec. 1257 (3) of the Judicial Code, being Title 28, United States Code, Sec. 1257 (3).

The invalidity of the tax imposed by New York Tax Law, Article 16-A, under the Fourteenth Amendment to the United States Constitution was specifically raised by petitioner in his "Applications for Revision" of the tax, filed with the New York State Tax Commission when the tax was originally assessed (pp. 25-26). Such "Applications for Revision" were denied (p. 27). The constitutional issue was presented again in the formal hearing held before the State Tax Commission. Petitioner there urged that a special tax could not be imposed on the right to work (p. 29); that the exemption of certain professions and the taxing of others results in a denial of equal protection (pp. 29-30); that uncertainty in the application of the Statute results in a denial of due process (p. 30). The Final Determination of the Tax Commission upheld the assessments with minor

modifications in the amounts subjected to tax (pp. 48-49). Petitioner's petition for Certiorari Order addressed to the New York Supreme Court for Albany County urged that the tax violated the Fourteenth Amendment to the United States Constitution (pp. 5-6, 7). The affidavit in support of such petition set forth the three bases for constitutional invalidity set forth above (pp. 13-14). The opinion of the Appellate Division, Third Department, held that the State has the power to tax unincorporated businesses (p. 53); that the classification effected by the Statute did not constitute a denial of equal protection (pp. 53-54); and that there is no such uncertainty in the application of the Statute as to result in a denial of due process (p. 54). Petitioner's notice of appeal to the New York Court of Appeals was based on the constitutional issues (p. 50). The New York Court of Appeals affirmed the order of the Appellate Division, Third Department, without opinion (pp. 56-57).

The Statute Involved

The statute involved is New York Tax Law, Article 16-A. The pertinent provisions of such article as in effect in the years of the assessments here in issue, are:

> "SEC. 386. DEFINITIONS
>
> For the purpose of this article, if not inconsistent with its provisions and unless otherwise required by its context, the definitions contained in section three hundred fifty of this chapter shall be applicable and, in addition, the words 'unincorporated business' means any trade, business or occupation conducted or engaged in by an individual, statutory or common law trust, estate, partnership or limited or special partnership, society, association, executor, administrator, receiver, trustee, liquidator, referee, assignee, or by any other entity or fiduciary,

other than a trade or business conducted or engaged in by any corporation, or by any other entity subject to the tax imposed by articles nine, nine-a nine-b or nine-c of this chapter, and include any trade or business which if conducted or engaged in by a corporation would be taxable under any of said articles; but exclude the practice of law, medicine, dentistry, architecture which under existing law cannot be conducted under corporate structure, and any other case in which more than eighty per centum of the gross income is derived from the personal services actually rendered by the individual or the members of the partnership or other entity in the practice of any other profession and in which capital is not a material income producing factor. It is not intended that an owner, lessee or fiduciary shall be deemed engaged in an unincorporated business solely by reason of the holding, leasing or managing of real property or that an individual shall be deemed engaged in an unincorporated business with respect to compensation for services rendered by him as an employee, or as an officer of a corporation, society or association, or of a state, municipality or other political subdivision of a state, or as an executor, administrator, receiver, trustee, liquidator, referee, assignee or other fiduciary, unless such compensation constitutes receipts of a business regularly carried on by such individual."

"SEC. 386-a. IMPOSITION OF TAX

A tax is hereby imposed upon the entire net income of any unincorporated business wholly or partly carried on within this state * * * which tax shall be equal to four per centum of the entire net income within this state of such unincorporated business and shall be payable by the taxpayer conducting the same. The tax imposed by this article shall be in addition to any other taxes imposed by this chapter or any other law."

Summary Statement of the Matter Involved

By its final determination, dated March 3, 1949, the New York State Tax Commission assessed petitioner for payment of Unincorporated Business Tax, under Article 16-A of the New York Tax Law for the years 1941, 1942, and 1943 (pp. 46-49). The assessments were made with respect to the net income derived by petitioner from the conduct of his profession in the State of New York, as a consultant on matters of corporate finance and reorganization (pp. 20-22). The Appellate Division of the New York Supreme Court, Third Department, confirmed the Tax Commission's determination (pp. 51-52). The New York Court of Appeals affirmed the decision of the Appellate Division (pp. 56-57).

In proceedings before the State Tax Commission and in the State Court proceedings, petitioner has consistently taken the position that:

> (i) Article 16-A of the New York Tax Law as applied to petitioner is in violation of the Fourteenth Amendment to the Constitution of the United States (pp. 25-26, 28-30, 5-7, 13-14, 52-54, 50).
>
> (ii) Petitioner is engaged in a profession and hence exempted from tax under the provisions of Article 16-A (pp. 25-26, 30, 44, 7, 10-12, 54-55).

Petitioner studied law and economics at the University of Illinois (pp. 8, 31, 54). Thereafter he took an intensive course of study in corporate finance at a school conducted by the Guaranty Company of New York (pp. 9, 31-32, 54). He was thereafter employed by that Company from 1925 to 1934. In the course of such employment he was continuously engaged in the analysis of corporate financial structures incident to the Company's purchase and distribution of corporate securities. He became an Assistant Vice-President of the Company (pp. 9, 32-33). The Guaranty Company of

New York was dissolved in 1934, and petitioner then joined the corporate banking department of the Guaranty Trust Company of New York. He was there engaged in the study and analysis of corporate financial structures in connection with the making of corporate loans (pp. 9, 33, 54).

From 1937 to 1941, petitioner was successively employed by Illinois Glass Company and then by one of its subsidiaries, as Vice President and Executive Vice President respectively, for the specific purpose, in each case, of planning and effecting a financial reorganization of these companies (pp. 9-10, 33-34).

In 1941 petitioner opened his own office in New York City as a professional consultant in matters of corporate finance and reorganization (pp. 10, 34). He employed only a secretary (pp. 10, 34, 41). All services were rendered by petitioner personally (pp. 10, 34, 41). His clients included nationally and internationally known industrial concerns. Petitioner advised them on their problems in corporate finance and reorganization (pp. 10-12, 34-38). Charges for his services were based in some cases on an annual retainer fee, in others, on the importance of the particular work performed. He followed no fixed schedule of charges (pp. 10, 34-38).

The assessments under Article 16-A for the years 1941, 1942 and 1943 (pp. 20-22), were made on the net income derived by petitioner exclusively from his conduct of this profession. Such assessments were in addition to the regular New York State tax on personal income derived from all sources, which is imposed by Article 16 of the New York Tax Law. Petitioner paid the latter tax on his personal income for each of the years to which the Article 16-A assessments relate.

The State of New York imposes no special and separate tax on income which is not derived from work.

Questions Presented

The questions herein presented are:

(1) Whether New York Tax Law, Article 16-A, which imposes a tax exclusively upon the net income derived by an individual from his exercise of the right to labor, violates the Fourteenth Amendment to the Constitution of the United States.

(2) Whether New York Tax Law, Article 16-A, which is based upon a legislative purpose to tax non-corporate enterprises competing with corporations, violates the Fourteenth Amendment to the Constitution of the United States, by taxing certain of such corporate-competing enterprises while arbitrarily exempting others of such enterprises in disregard of the Statute's legislative purpose.

(3) Whether New York Tax Law, Article 16-A is so vague and uncertain as to violate the Fourteenth Amendment to the Constitution of the United States, because the words of the Statute, and particularly the phrase, "any other profession" appearing in Sec. 386 thereof, do not have a meaning well enough known to permit those within their reach, correctly to apply them.

Reasons for Allowing Writ of Certiorari

1. A substantial Federal question is presented as to whether a State may levy a special and discriminatory tax on net income derived from an exercise of the right to work where no element of the State's police or supervisory power is involved. The highest court of the State of New Hampshire appears to have held that such a tax may not be imposed. *In re Opinion of the Justices,* 82 New Hampshire 561, 563. The same view is taken by Robinson, *J.* in his

concurring opinion in *State* v. *Gillespie,* 39 North Dakota 512, 523. There is therefore a conflict among the several State Courts.

2. The decision of the State Court is probably not in accord with the decision of this Court relating to permissible classification for tax purposes. This Court has held that any classification for tax purposes must have a fair and substantial relation to the object of the legislation. *Louisville Gas Co.* v. *Coleman,* 277 U. S. 32, 37. The object of Article 16-A of the New York Tax Law was to tax non-corporate enterprises competing with corporations. Yet the classification under Article 16-A, which results in the taxing of some corporate competing enterprises and the exemption of others, bears no relation to such object.

3. This Court has regularly held that a statute requiring the doing of an act must be sufficiently clear and understandable to apprise those to whom it applies of the duty imposed upon them. *Connally* v. *General Construction Co.,* 269 U. S. 385. The State Court appears to have overlooked the standards of legislative clarity and certainty which are required under the Fourteenth Amendment. For Article 16-A, Sec. 386, of the New York Tax Law exempts from tax the recognized professions of law, medicine, dentistry, and architecture, and it then goes on to exempt "any other profession" in which capital is not a material income producing factor and income from the conduct of which is derived from personal services. The Courts of New York have themselves differed as to what occupations are to be included in the phrase "any other profession"; persons of common intelligence can do no more than guess at its meaning; and application of the law becomes a matter of subjective prejudice and favor.

LEE MCCANLISS,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

The record of the opinions of the lower Courts, the basis of the jurisdiction of this Court, the Statute involved and a short statement of the facts are hereinabove set out.

Specification of Errors

I

The Court below erred in holding that a discriminatory tax imposed on the net income derived by an individual from his exercise of the constitutionally protected right to work does not violate the Fourteenth Amendment to the Constitution of the United States.

II

The Court below erred in holding that the legislative purpose of New York Tax Law, Article 16-A permits a classification exempting some occupations that compete with corporations while taxing others.

III

The Court below erred in holding that the language of Article 16-A and particularly the phrase "any other profession" contained in Sec. 386 thereof, had a sufficiently clear and definite meaning to meet the requirements of due process of law.

Summary of Argument

I

Petitioner contends that the right to follow any of the common occupations of life is an inalienable right; that a discriminatory tax may not be imposed by a State upon the

privilege of exercising such right. New York Tax Law, Article 16-A imposes a discriminatory tax on the exercise of such right and therefore violates the Fourteenth Amendment to the Constitution of the United States.

II

Petitioner contends that the legislative purpose of Article 16-A was to tax the occupations of individuals which compete with corporations. That based on such purpose, the legislature did not have the power arbitrarily to exempt certain corporate-competing enterprises while leaving others subject to tax; that Article 16-A by so doing violates the Fourteenth Amendment to the Constitution of the United States. *Louisville Gas Co.* v. *Coleman,* 277 U. S. 32, 37.

III

Petitioner contends that the language of New York Tax Law, Article 16-A and particularly the phrase "any other profession" contained in Sec. 386 thereof, is so vague and uncertain as to require those within its possible reach to guess at its meaning; that this uncertainty constitutes a denial of due process of law. *Connally* v. *General Construction Co.,* 269 U. S. 385, 391.

Argument

POINT I

A State may not impose a discriminatory tax on the constitutionally protected right to work.

The right of an individual to work and to conduct a business is a natural right. It is protected as such by the Constitution. It is not a privilege conferred by the State. In *Butchers Union* v. *Crescent City Co.,* 111 U. S. 746, it is said (p. 762):

> "The right to follow any of the common occupations of life is an inalienable right; it was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence * * *."

Likewise, in *Allgeyer* v. *Louisiana,* 165 U. S. 578, the Court said that the rights guaranteed by the Fourteenth Amendment to the United States Constitution included one's right (p. 589):

> "to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, * * *."

New York Tax Law, Article 16-A imposes a special tax on the net income derived by an individual from any trade, business or certain professions in which he may engage. The purpose of this tax as appears from the provisions of Sec. 386 thereof, and as stated by the highest Court of the State, is to impose upon individuals competing with corporations a tax equivalent to the franchise tax imposed upon corporations. *People ex rel. Tower* v. *State Tax Commission,* 282 N. Y. 407, 409; *Matter of Thompson* v. *Mealey,* 290 N. Y. 230, 234. There is nothing to suggest that this tax constitutes an exercise of the supervisory or police power of the State. It is therefore a discriminatory tax imposed upon the exercise of a common and constitutionally protected right.

The Supreme Court of New Hampshire in *In re Opinion of the Justices,* 82 New Hampshire 561, held that such a tax may not be sustained, saying (p. 563):

> "Many of the occupations or acts thus sought to be levied upon involve only the ordinary transactions of private life. They contain no element subject to

supervision either under the police power or as things affected with a public use.

"The mere statement of the general proposition is sufficient to show that it unquestionably exceeds the legislative power. *State* v. *Express Co.*, 60 N. H. 219. Even in jurisdictions where excises are authorized, the power to lay them does not extend to the imposition of a charge upon the exercise of a common right. *O'Keefe* v. *Somerville*, 190 Mass. 110, 76 N. E. 457, 112 Am. St. Rep. 316, 5 Am. Cas. 684."

The same principle is expressed in the concurring opinion in *State* v. *Gillespie*, 39 North Dakota 512 (p. 522):

"Every person is entitled to acquire and possess and protect property, and to pursue and obtain safety and happiness, and for that purpose to follow any honest occupation without paying a tax for the privilege of doing it."

The right to work being a constitutionally preferred and protected right is entitled to the same protection against discriminatory taxation as are such other specially protected rights as interstate commerce, freedom of religion and freedom of press and speech.

An income or other tax which singles out and makes interstate commerce its target is discriminatory and invalid. *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, 48. *Piedmont & N. Ry. Co.* v. *Query*, 56 F. 2d 172.

In *Murdock* v. *Pennsylvania*, 319 U. S. 105, where the constitutionally protected right was religious freedom, the Court said (p. 113):

"A State may not impose a charge for the enjoyment of a right guaranteed by the Federal Constitution."

And, further (p. 115):

> "This tax is not a charge for the enjoyment of a privilege or benefit bestowed by the state. The privilege in question exists apart from state authority. It is guaranteed the people by the Federal Constitution."

Carmichael v. *Southern Coal Co.*, 301 U. S. 495, sustaining the Alabama Unemployment Corporation Act, provides no basis for upholding New York Tax Law, Article 16-A. The tax there upheld was enacted by the legislature in response to requirements of general welfare. The Court expressly stated (p. 518):

> "When public evils ensue from individual misfortunes or needs, the legislature may strike at the evil at its source."

The Court upheld the levy in the *Carmichael* case as designed to protect the individuals taxed in their right to work. In contrast the unincorporated business tax is not designed to protect anyone in his right to work, but on the contrary to deprive him of his right to work.

POINT II

The exemption under New York Tax Law, Article 16-A of certain occupations which compete with corporations produces an unconstitutional discrimination and denial of equal protection of the law.

The highest State Court in the *Tower* case *supra* has declared that the legislative purpose of Article 16-A was:

> "* * * to lay a tax upon various types of non-corporate enterprise competing with corporations in this State which are required to pay a corporate franchise tax measured by net income."

Section 386-a of the law imposes a tax on the net income of every "unincorporated business" carried on in the State.

Section 386 provides that the words "'unincorporated business' means any trade, business or occupation conducted or engaged in by an individual * * *". It then excludes "the practice of law, medicine, dentistry, architecture which under existing law cannot be conducted under corporate structure * * *". This exclusion is justified by the purpose of the legislation. It excludes from tax only those occupations which cannot be conducted in corporate form and hence do not compete with corporations. But the Statute provides a further exclusion as follows:

> "* * * any other case in which more than eighty per centum of the gross income is derived from the personal services actually rendered by the individual * * * in the practice of any other profession and in which capital is not a material income producing factor." (Sec. 386.)

The New York Court of Appeals has held that an industrial designer and a landscape architect are entitled to the benefit of this exclusion. *Matter of Teague* v. *Graves,* 287 N. Y. 549; *Matter of Geiffert* v. *Mealey,* 293 N. Y. 583. Yet, as a matter of common knowledge, industrial designing and landscape architecting can be and are conducted in corporate form and the unincorporated designer or architect competes with the incorporated. It is therefore apparent that Article 16-A, the declared purpose of which is to tax enterprises competing with corporations, taxes only some enterprises competing with corporations and arbitrarily exempts others. The legislative purpose of the act contains no basis or justification for the discrimination thus produced.

This Court has stated the criteria for determining the validity of tax classification in *Louisville Gas Co.* v. *Coleman*, 277 U. S. 32 (p. 37):

> "* * * the power of the state to classify for purposes of taxation is of wide range and flexibility, provided always, that the classification 'must be reasonable, not arbitrary, and must *rest upon some ground of difference having a fair and substantial relation to the object of the legislation,* so that all persons similarly circumstanced shall be treated alike. (Emphasis added.) * * * *mere* difference is not enough: the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S. 150, 155. Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." (Emphasis added.)

Invalidity of classification under Article 16-A is emphasized by the State Courts' determination that petitioner, having the qualifications set forth in the petition, is not entitled to an exemption, while the landscape architect and industrial designer, having the qualifications set forth and relied upon in the *Teague* and *Geiffert* cases *supra*, are entitled to the exemption. This results from the Courts' labeling of the industrial designer and landscape architect as being engaged in "professions", and the denial of such labeling to petitioner. Yet no distinction, valid for tax differentiation, can be found among the three occupations. It has been pointed out that each occupation competes with the same type of business conducted in corporate form. And the other basic attributes of each occu-

pation are so similar that they can afford no basis for separate tax classification. Each entails specialized instruction and knowledge in a recognized field of learning, and the application of such knowledge for the use and counseling of others in practical affairs.

The classification is constitutionally invalid.

POINT III

Uncertainty in the application of New York Tax Law, Article 16-A results in a denial of due process of law.

In *Connally* v. *General Construction Co.*, 269 U. S. 385 (1925), this Court stated (p. 391):

> "And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. *International Harvester Co.* v. *Ky.*, 234 U. S. 216, 221; *Collins* v. *Ky.*, 234 U. S. 634, 638.
>
> "The question whether given legislative enactments have been thus wanting in certainty has frequently been before this court. * * * it will be enough for present purposes to say generally that the decisions of the court upholding statutes as sufficiently certain, rested upon the conclusion that they employed words or phrases having a technical or other special meaning, *well enough known to enable those within their reach to correctly apply them* * * *." (Emphasis added.)

Petitioner's liability for or exemption from tax under Article 16-A is dependent upon whether his occupation is within the exemption contained in the following portion of Sec. 386 of the law:

> "* * * any other case in which more than eighty per centum of the gross income is derived from the personal services actually rendered by the individual * * * in the practice *of any other profession* and in which capital is not a material income producing factor." (Emphasis added.)

Petitioner's gross income was derived in its entirety from personal services actually rendered by him (pp. 10, 34-38, 41). Capital was not a material income producing factor (pp. 10, 34, 41). The question, therefore, was whether his occupation constituted "any other profession". As used in the Statute, this phrase refers to professions other than the recognized professions of law, medicine, dentistry and architecture which are expressly referred to in the Statute. There is therefore nothing in the text of the Statute which furnishes any frame of reference for determining the meaning of "any other profession".

The State Tax Commission has arbitrarily ruled that the following occupations constitute professions within the meaning of the law (Regulations—Question 39): Accounting, Certified Shorthand Reporting, Chiropody, Dental Hygiene, Engineering, Optometry, Osteopathy, Pharmacy, Physiotherapy, Teaching, Veterinary Medicine and Surgery.

The highest State Court has twice overruled the State Tax Commission to hold that an industrial designer (*Matter of Teague* v. *Graves*, 287 N. Y. 549; aff'ing. 261 App. Div. 652) and a landscape architect (*Matter of Geiffert* v. *Mealey*, 293 N. Y. 583, reversing 267 App. Div. 681), constitute professions within the meaning of the Statute. In the

first of these cases, the Court found the word "profession" to have a meaning different from that which both the Tax Commission and the lower Court believed to be correct and in the latter case, the Court's interpretation was contrary to that of the Tax Commission alone. It was in the first of these cases that one of the Justices of the Appellate Division, in his vigorous dissent to the Court's determination that an industrial designer was engaged in a profession, stated:

> "It is difficult, if not impossible to lay down any strict legal definition of the term because the line of demarcation may vary from time to time." (261 App. Div. 652, 656.)

The term "any other profession" is therefore not a phrase having a technical or other special meaning well enough known to enable those within its reach to correctly apply it.

Inability of the courts to agree upon a meaning is persuasive proof that the article is too vague and uncertain to be accorded any validity. *U. S.* v. *L. Cohen Grocery Co.*, 255 U. S. 81.

No two persons, no matter how learned they were, nor how long they studied the subject, could possibly agree upon a determination as to what occupations the Statute meant when it referred to "any other profession".

Uncertainty as to the application of the Statute establishes that liability as determined thereunder may be the result of "subjective prejudice and favor" (*Standard C. & M. Corp.* v. *Waugh C. Corp.*, 231 N. Y. 51).

New York Tax Law, Article 16-A as applied to petitioner, is so vague and uncertain as to constitute a denial of due process of law.

CONCLUSION

Your petitioner prays that the petition for a writ of certiorari be granted.

Respectfully submitted,

LEE MCCANLISS,
Counsel for Petitioner.

New York, N. Y., August 26th, 1950.